IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STONEBRIDGE LIFE INSURANCE COMPANY, Plaintiff,	)	
v.	)	No. 03-739-RJL
FEDERAL TRADE COMMISSION, Defendant.	)	

DEFENDANT FEDERAL TRADE COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

Although the Federal Trade Commission ("Commission" or "FTC") issued the amendments to its Telemarketing Sales Rule ("Rule") on December 18, 2002, and promulgated the Rule on January 29, 2003, plaintiff Stonebridge Insurance Co. ("Stonebridge") waited until ten days before portions of these important consumer protections are scheduled to take effect to file its complaint and move this Court for a temporary restraining order ("TRO"). Stonebridge's lack of diligence, standing alone, is sufficient to justify rejection of its request for extraordinary relief. Further, Stonebridge cannot demonstrate a likelihood of success. On the contrary, Stonebridge's motion is nothing more than an attempt to obtain pre-enforcement review of hypothetical actions that Stonebridge believes the Commission *might* initiate. Such pre-enforcement actions are routinely dismissed and Stonebridge's concerns certainly do not justify a temporary restraining order.[1]

[1] Two other actions have been brought challenging the rule. Mainstream Marketing Services, Inc., et al. v. FTC, No. 03-N-184 (MJW) (D. Colo.); U.S. Security, et al. v. FTC, No. CIV-03-122-W (W.D. Okla.) Both of these actions were filed on January 29, 2003, the day the Rule was promulgated. Stonebridge is a member of a trade association, the American Teleservices Association ("ATA"), that is a plaintiff in Mainstream Marketing. See Stonebridge's Memorandum in Support of Motion for Temporary Restraining Order ("Memorandum") at 7. On March 26, 2003, the court in U.S. Security v. FTC, denied plaintiffs'

STATEMENT

In 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act, P.L. 103-297, codified at 15 U.S.C. § 6101, et seq. ("Telemarketing Act"). Congress noted that "[i]nterstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud," and that "[c]onsumers are victimized by other forms of telemarketing deception and abuse." 15 U.S.C. § 6101(2) and (4), respectively. Accordingly, Congress ordered the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. § 6102(a)(1).

The FTC promulgated the original Rule on August 23, 1995. See 60 Fed. Reg. 43842, codified at 16 C.F.R. Part 310. The original Rule prohibits, inter alia, the following deceptive telemarketing practices: failing to disclose, or misrepresenting, material provisions of a sales transaction; making unauthorized withdrawals from a consumer's checking account; and engaging in credit card laundering. See 16 C.F.R. § 310.3. The original Rule also prohibits, inter alia, the following telemarketing practices: using threats or obscene language; causing a consumer's telephone to ring repeatedly or continuously with intent to annoy; calling a consumer who has stated that he or she does not wish to be called (the company-specific do-not-call provision); receiving advance payment for goods or services that purport to improve a consumer's credit rating; calling before 8:00 a.m. or after 9:00 p.m.; and failing promptly to disclose the seller's identity and the nature of the telemarketing call. See 16 C.F.R. § 310.4. The

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motion for a preliminary injunction that would have prevented two of the Rule's provisions from taking effect on March 31, 2003.

Rule has become one of the FTC's most significant consumer protection tools. See 68 Fed. Reg. 4627 n.551 (FTC has filed 139 complaints under the Rule, resulting in judgments totaling more than $200 million).

As enacted by Congress in 1994, the Telemarketing Act limited the scope of the Rule to the telemarketing of goods and services. See 15 U.S.C. § 6106(4). It also provided that "no activity which is outside the jurisdiction of [the FTC Act] shall be affected by" the Telemarketing Act. 15 U.S.C. § 6105(a). The FTC Act contains a number of status-based exemptions. For example, the Act's prohibitions do not apply to banks, savings and loan institutions, federal credit unions, common carriers, and entities subject to the Packers and Stockyards Act. See 15 U.S.C. § 45(a). Also, the FTC Act does not apply to not-for-profit corporations. See 15 U.S.C. § 44. In addition to these status-based exemptions, the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., provides that the FTC Act does not apply to the "business of insurance" to the extent that such business is "regulated by state law." 15 U.S.C. § 1012. Consistent with these limitations, the Commission, in promulgating the original Rule, announced that the Rule "does not apply to the business of insurance to the extent that such business is regulated by state law." 60 Fed. Reg. 43843 (1995).[2]

On January 30, 2002, the FTC published a Notice of Proposed Rulemaking ("NPRM") proposing several amendments to the Rule. See 67 Fed. Reg. 4492. The primary focus of the proposed amendments was establishing a national "do-not-call" registry for consumers who want

[2] Concerned about fraudulent charitable solicitations in the wake of the events of September 11, 2001, Congress, when it passed the USA PATRIOT Act, expanded the Commission's jurisdiction under the Telemarketing Act so that the Rule would apply not just to telemarketing for goods and services but also to telemarketing to induce charitable contributions. P.L. 107-56 § 1011.

to limit the number of telemarketing calls they receive. The NPRM also proposed, inter alia, a prohibition on telemarketers receiving or disclosing consumers' account numbers or other billing information, and restrictions on abandoned calls (i.e, calls that either click dead when the consumer answers, or "dead air" calls, where the line is open but no one is there).[3]

On December 18, 2002, the FTC announced its approval of the proposed amendments, which it formally promulgated on January 29, 2003. See 68 Fed. Reg. 4580. The amended Rule retains all the requirements of the original Rule, including the company-specific do-not-call provision. It has several new features, including a national do-not-call registry; restrictions on abandoned calls; safeguards to protect consumers in telemarketing transactions involving preacquired account information; a prohibition on the sale or disclosure of unencrypted account numbers; and a requirement that telemarketers transmit caller identification information. While most of the amendments take effect on March 31, 2003, the requirement that telemarketers transmit caller identification information will not take effect until January 29, 2004. The Commission has not set an effective date for the do-not-call registry, but announced that it would take effect approximately seven months after the Commission had awarded a contract for creation of the registry.[4] Finally, as a result of administrative stay petitions filed by two trade associations – the Direct Marketing Association and the ATA (of which Stonebridge is a

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[3] The FTC received and considered more than 64,000 comments in response to the Notice of Proposed Rulemaking, including two comments from trade associations that represent Stonebridge. See Stonebridge's Memorandum in Support of Motion for Temporary Restraining Order ("Memorandum") at 7 & n.1.

[4] The FTC awarded a contract on March 1, 2003, and will soon commence a rulemaking to establish fees and set an effective date for the registry portion of the Rule.

member) – the Commission delayed the recorded greeting requirement for telemarketers to October 1, 2003. Neither of the petitions raised any of the arguments put forth by Stonebridge in support of its motion for a TRO.

In promulgating the amended Rule, the Commission specifically recognized that, even though the USA PATRIOT Act expanded the Commission's jurisdiction over fraudulent charitable solicitations, the amendments did not effect any change to the jurisdictional limits of § 6105(a) of the Telemarketing Act. 68 Fed. Reg. 4584-85. Indeed, in its Statement of Basis and Purpose, the Commission responded to requests from several commenters by stating that "it is unnecessary to state in the Rule what is already plain in the Telemarketing Act, i.e., that its jurisdiction for purposes of the [Rule] is coterminous with its jurisdiction under the FTC Act." 68 Fed. Reg. 4586. With regard to the request from the National Association of Insurance & Financial Advisors – of which Stonebridge is a member – for an exemption for insurance companies, the Commission, citing the McCarran Act, stated that "its jurisdictional limitations regarding the business of insurance are clear * * *." 68 Fed. Reg. 4587 & n.74. Thus, the Commission concluded, "no express exemption for these entities is necessary." Id.

On March 21, 2003, Stonebridge filed the instant complaint and motion for a temporary restraining order.

ARGUMENT

All of the arguments raised by Stonebridge are based on a strawman premise – that the Commission will attempt to enforce its Rule against activities that are outside its jurisdiction.[5]

[5] To obtain the TRO it requests, Stonebridge must show that it has a substantial likelihood of success on the merits, that it would suffer irreparable injury if the TRO were not granted, that the TRO would not substantially injure other parties, and that the TRO would

Stonebridge's concerns about the hypothetical possibility that the Commission *might* exceed its jurisdiction cannot possibly justify a request for a TRO. Because none of Stonebridge's arguments is ripe, it cannot make any showing of likelihood of success, a showing that is a prerequisite to the extraordinary relief that Stonebridge seeks here. Further, the only harm it asserts is that it will somehow be required to comply with a regulation that it claims does not apply to it. Because the Commission cannot enforce the Rule with respect to entities or practices that fall outside its jurisdiction, this assertion of harm is no more substantial than Stonebridge's legal arguments. Additionally, the balance of equities is overwhelmingly against enjoining the Rule's important consumer protections. Accordingly, Stonebridge's motion for a TRO should be denied.

1. Stonebridge fails to show substantial likelihood of success on the merits

Stonebridge is not likely to succeed on the merits because none of the arguments it has raised is ripe. Stonebridge argues first that the Commission would exceed its jurisdiction, in violation of the McCarran-Ferguson Act, if it enforces the Rule against activities that are part of the "business of insurance" and regulated by state law. Memorandum at 12-18. Its second argument is that, if the Commission does enforce the Rule in violation of its jurisdiction, it will also violate the Constitution. Memorandum at 18-23. These arguments are premised on the unsupported assumption that, once the amendments go into effect, the Commission will alter the enforcement approach it has followed for more than seven years and commence enforcement actions against activities that are outside its jurisdiction. Because these arguments are premised on mere hypothetical concerns about the direction of future FTC enforcement initiatives, they are

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further the public interest. Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001).

not ripe and may not be raised in the context of a facial challenge to the Rule. At a minimum, they do not support issuance of a TRO.

In Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 148-49 (1967), the Court held that it would not enjoin an agency rule in a pre-enforcement challenge unless the issue raised by the challenger was ripe for judicial resolution. To determine if an issue is ripe, the Court indicated that it would first consider whether the issue is fit for judicial resolution, and would next consider the impact on the party making the challenge of withholding review.

An issue is fit for judicial resolution only if no further evidence is necessary and the issue can be resolved as a matter of law. Abbott Laboratories, 378 U.S. at 151. It is pellucid that the jurisdictional issues raised by Stonebridge are not fit for judicial resolution. Unlike the FTC Act's status-based exemptions for entities such as banks, common carriers, savings and loans (see 15 U.S.C. § 45), the exemption provided by the McCarran-Ferguson Act is for activities that constitute the "business of insurance" and that are "regulated by state law." 15 U.S.C. § 1012(b). The Supreme Court has explained that a three-part fact-based inquiry is necessary to determine whether any activity constitutes the "business of insurance." Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129 (1982). First, does the activity have the effect of transferring or spreading a policyholder's risk; second, is the activity an integral part of the policy relationship between the insurer and the insured; and third, is the practice limited to entities within the insurance industry. Also, in order to determine whether the McCarran-Ferguson Act exemption applies, it is necessary to assess whether the activity at issue is subject to state regulation. With respect to this portion of the inquiry it is necessary to determine not only whether the activity is "regulated by state law," but also whether the state regulation was enacted for the purpose of

regulating the "business of insurance." See Autry v. Northwest Premium Services, Inc., 144 F.3d 1037, 1043 (7th Cir. 1998). Furthermore, with regard to the interstate sale of insurance, it is necessary to ascertain not only whether the practice in question is regulated by the states in which the practice has its impact (see FTC v. Travelers Health Ass'n, 362 U.S. 293, 298-99 (1960)), but also whether such states are able to exert local control "through [their] own provisions, instrumentalities, and processes." Travelers Health Ass'n v. FTC, 298 F.2d 820, 823 (8th Cir. 1962).

The extent of the factual inquiry involved in determining whether any given activity is subject to McCarran-Ferguson Act exemption renders it inappropriate at this time even to attempt any resolution of the jurisdictional issues raised by Stonebridge. The Rule includes a wide variety of prohibitions and restrictions on various deceptive and abusive telemarketing practices. For example, the Rule prohibits telemarketers from receiving advance payment for goods or services that purport to improve a consumer's credit history. 16 C.F.R. § 310.4(a)(2). If an insurance company, or a third-party telemarketer working on behalf of an insurance company, were selling goods or services to improve a consumer's credit history, it is far from clear whether such a sale transfers or spreads risk, whether it is integral to the policy relationship between the insurer and insured, or whether it is a practice limited to the insurance industry. Even if a particular practice were deemed to be part of the "business of insurance," the factual inquiry would not be complete because it would still be necessary to determine whether the activities were "regulated by state law." 15 U.S.C. § 1012(b). This, of course, could lead to different results depending upon the regulatory regime in effect in the state in which the insurance company or telemarketer conducted the activity and, with respect to the interstate sale

of insurance, the processes available to any particular state to exert regulatory control over prohibited practices within its own borders.[6]

It is hard to imagine an inquiry more fact-specific and less ripe, at this time, for judicial consideration. What is obvious, however, is that Stonebridge misconceives the requirements for establishing that particular practices are exempt for purposes of the McCarran-Ferguson Act. As explained above, the FTC Act exempts certain entities (such as banks, common carriers, etc.) based solely on their status. When such an entity hires a third party to telemarket on its behalf, the telemarketer is not shielded from Commission review by the exempt status of its client unless it is itself a bank, common carrier, or other exempt entity. As discussed in the Rule's Statement of Basis and Purpose:

> [A]bsent amendments to the FTC Act or the Telemarketing Act, the Commission is limited with regard to its ability to regulate under the Rule those entities explicitly exempt from the FTC Act. Despite this limitation, the Commission can reach telemarketing activity conducted by non-exempt entities on behalf of exempt entities. Therefore, when an exempt financial institution, telephone company, or non-profit entity conducts its telemarketing campaign using a third-party telemarketer not exempt from the Rule, then that campaign is subject to the provisions of the [Rule].

68 Fed. Reg. 4587. By contrast, the status of the entity that engages in practices prohibited by the Rule is not dispositive of the McCarran-Ferguson Act restriction on the Commission's jurisdiction. It is a functional exemption that exempts certain activities, regardless of the entity that engages in them. See Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217 (1979) (exemption is for the "business of insurance," not the "business of insurance companies").

Although the Commission's statement at 68 Fed. Reg. 4587 does not apply to the

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[6] The discussion at pp. 16-18 of Stonebridge's Memorandum underscores the variety of state insurance regulations.

McCarran-Ferguson Act, Stonebridge incorrectly drew the inference that it did, and all its arguments spring from that error. Its first argument is that activities that constitute the business of insurance are exempt from the Rule. Memorandum at 12-18. The Commission does not dispute that, to the extent the McCarran-Ferguson Act exemption applies to certain practices, those practices are exempt from the Rule. Indeed, the Rule's Statement of Basis and Purpose specifically recognizes the exemption. See 68 Fed. Reg. 4587 & n.74. Stonebridge's second argument is that the Commission would violate the First and Fifth Amendments of the Constitution in the event the Commission disregards the constraints of the McCarran-Ferguson Act. But the Commission has not ignored the McCarran-Ferguson Act during the seven years that the Rule has been in effect and there is no basis for believing it will do so in the future. Because the premise of Stonebridge's second argument is flawed, the argument collapses.[7]

Neither of the arguments raised by Stonebridge are ripe. Consequently, neither is likely to succeed on the merits and Stonebridge's motion must be denied.

2. Stonebridge fails to show irreparable injury

The only harms that Stonebridge alleges are based on its unfounded belief that the Commission will enforce the Rule against activities outside its jurisdiction. In particular, it contends that, if the Commission enforces the Rule against such activities, its constitutional rights will be infringed. It also contends that if it is required to comply with the Rule's prohibitions against deceptive and abusive telemarketing practices, it will suffer economic injury

[7] To the extent that Stonebridge means to suggest the Rule is constitutionally flawed merely because it does not apply to all telemarketers, the Supreme Court has made clear that there is no constitutional requirement that the government "make progress on every front before it can make progress on any front." United States v. Edge Broadcasting Co., 509 U.S. 418, 434 (1993).

because it will lose sales. As explained above, there is no factual basis for assuming that the Commission will take any steps to enforce the Rule against activities that fall outside its jurisdiction.

Further, it is well-established that injury will not support preliminary relief unless it is "both certain and great; it must be actual and not theoretical. Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time; the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Washington Gas Co. v. FERC, 758 F.2d 669, 674 (D.C.Cir. 1985) (internal quotation marks and citations omitted). Clearly, Stonebridge's alleged injury is neither certain nor great. It is theoretical, not actual or imminent.[8] Indeed, this is particularly so because the Rule has been in effect since 1995 and there has been no change to the Commission's position with respect to its jurisdiction (except with respect to solicitations on behalf of charities, which has no relevance to Stonebridge's complaint). Given that Stonebridge has not pointed to any instance in which the Commission has attempted to enforce the Rule against activities protected by the McCarran-Ferguson Act, there is no factual basis for Stonebridge's fear that the Commission will disregard the jurisdictional constraints imposed on it by the McCarran-Ferguson Act. Notwithstanding Stonebridge's fears that the Commission will act unlawfully, the Commission is entitled to a presumption of regularity. See American Bankers Ass'n v. NCUA, 38 F. Supp. 2d 114, 123 (D.D.C. 1999) (denying motion for preliminary injunction). Accordingly, the sort of extraordinary relief that

[8] The lack of imminence is particularly glaring with respect to the Rule provisions that do not take effect until October 2003 or January 2004. See supra.

Stonebridge seeks is completely unwarranted.

Moreover, there is no excuse for Stonebridge's delay with this eleventh hour filing. The Commission announced its final Rule on December 18, 2002, and formal promulgation occurred on January 29, 2003. Immediately thereafter, two actions were filed challenging the Rule, including one by the ATA, of which Stonebridge is a member. See n.1, supra. ATA's pending complaint in the District of Colorado does not raise any of the arguments that Stonebridge pursues here in support of its request for preliminary relief. See Mainstream Marketing, Inc. v. FTC, No. 03-N-184 (D. Colo.). Further, on February 28, 2003, ATA filed an administrative request for a stay, which, on March 14, 2003, was granted in part and denied in part. In requesting an administrative stay, ATA did not raise any of the arguments that Stonebridge advances here in support of a TRO. Given that Stonebridge did not include its arguments in either ATA's complaint or its administrative request for a stay (and did not file its own petition for a stay), Stonebridge's suggestion that it had to wait to file its complaint until after the Commission's March 14 decision is simply absurd. See Memorandum at 10-11. As the D.C. Circuit has held, such inexcusable delay is fatal to a request for preliminary relief. See Fund for Animals v. Frizzell, 530 F.2d 982, 987 (D.C. Cir. 1975) (delay of 44 days in challenging a regulation held inexcusable).

3. Balancing the equities and the public interest overwhelmingly favor denial of Stonebridge's Motion

As shown above, the only harms asserted by Stonebridge are premised on a misconception about the constraints imposed on the Commission by the McCarran-Ferguson Act and its unfounded concern that the Commission will disregard those constraints in enforcing the

Rule. Given these circumstances, the balance of public and private equities clearly weighs against granting any preliminary relief.

CONCLUSION

For the reasons set forth above, Stonebridge's Motion for Temporary Restraining Order should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2003, I served a copy of defendant Federal Trade Commission's Opposition to Plaintiff's Motion for a Temporary Restraining Order on plaintiff by mailing a copy by overnight courier to the following:

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